HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 406 OF 1999.

1. Shripati Malhari Kudale,
   Age: 38 years,
2. Dattu Babu Kudale,Age:32 yrs.
3. Ram Khandu Kudale, Age: 27 yrs.
4. Anant Maruti Kudale, Age:28 yrs,
   All R/o: Ghutke, Post: Maley,
   Tal: Mulshi, Dist: Pune. ..Appellants.
   (Orig.Accused Nos. 1,3, 5 & 6.)

Versus.

State of Maharashtra. ..Respondent.
(At the instance of Poud
Police Station, Pune.)

ALONG WITH
CRIMINAL APPEAL NO. 201 OF 2000.

Kisan Ramji Kudale, Age: 37 yrs,
Occu: Agriculture,
All R/o: Ghutke, Post: Maley,
Tal: Mulshi, Dist: Pune. ..Appellant.
(At present in Yerawada (Orig. Accused No.4.)
Central Jail, Pune.)

Versus.

State of Maharashtra. ..Respondent.

Smt. Revati Mohite-Dere for the appellants.
Shri. Shekhar Ingwale for the Complainant.
Smt. V.R.Bhosale, APP for the respondent.

CORAM: S.B.MHASE &
S.R.SATHE, JJ.

DATE: September 21, 2005.

ORAL JUDGMENT (PER S.R.SATHE,J.):

1. The appellants original - accused in Sessions Case No. 110 of 1996 have preferred these appeals against the judgment and order passed by the

Additional Sessions Judge, Pune whereby the accused Nos. 1 to 6 were convicted for the offences punishable under Sections 147, 148, 323 read with 149 of the Indian Penal Code and section 341 read with 149 of the Indian Penal Code and they were sentenced to undergo R.I. for one year and pay fine of Rs.500/- each in default to suffer further R.I. for one month and to pay fine of Rs.100/- in default to suffer R.I. for one week respectively. The accused Nos.1 & 3 are convicted for the offences punishable under Section 307 read with 34 the Indian Penal Code and sentenced to undergo rigorous imprisonment for 7 years and to pay fine of Rs.5000/- each in default to suffer further R.I. for one year. The accused Nos. 4 & 6 are also convicted for the offences punishable under Section 302 read with 34 of the Indian Penal Code and sentenced to undergo imprisonment for life and to pay fine of Rs.5000/- each in default to suffer R.I. for one year.

2. The brief facts giving rise to these appeal are as under:

. Complainant- Sakharam Dharmaji Kudale is the real brother of the deceased Tukaram Dharmaji Kudale. They were residing at village Ghutke-shiv,

Taluka: Mulshi, Dist: Pune. The accused persons were also residing in the same village and as such Complainant, deceased and the accused were known to each other. There was a tradition in their village to collect some funds for **Kalbharaiv**. According to the prosecution, the said fund was being collected by the accused persons, and the Complainant party had asked for accounts of the said fund and on that count there was a dispute between the Complainant, his brother-Tukaram and his son Maruti on one side and the accused persons on the other side. Few months prior to the incident quarrel had taken place between the two parties and at that time Maruti Kudale was assaulted by the accused persons. On 23.10.1995 in the morning, the Complainant Sakharam, his brother Tukaram and Complainant's son Maruti had gone to police station to lodge a complaint accused for earlier incident. All of them were returning in the afternoon and Ramchandra Zore (Pw.6) was with them. When they crossed River and reached near the field of Bapu Balu Dighe at about 6.00 p.m. the accused persons who were hiding themselves in the paddy crop, came out of the said corp and accosted the Complainant and the deceased Tukaram. The accused were holding deadly weapons. Initially the accused Nos. 1, 3 & 5 started assaulting Complainant with

sickle, while other accused persons, including the present appellant and the deceased accused - Genu, assaulted Tukaram. When Pw-6, i.e, Ramchandra Zore tried to intervene, he was threatened by the accused. He, therefore, ran away from the said place. Similarly (Pw.7) Maruti Kudale also went away from the said place when the incident started. As a result of the assault made by the accused persons, the Complainant - Sakharam sustained grievous injury while his brother Tukaram died on the spot. The Complainant's son Maruti gave information about the said incident to PW.5 - Kanta Gajanan Dighe and others, and as a result of the same, all of them reached to the spot. Then, the Complainant was initially taken to Bamburde as there was no vehicle available for going to Poud. On the next day morning the Complainant was admitted to Government Hospital at Poud. When police were informed about the incident, they reached to the Government Hospital and statement of the Complainant- Sakharam was recorded there, wherein he narrated the entire incidence and named all the accused persons. On the basis of the said complaint, police registered CR. No. 137 of 1995 against the accused persons for the offences punishable under Sections 147, 148, 149, 341, 307 & 302 of the Indian Penal Code. The police drew the

inquest panchnama of the dead body of the Complainant' brother and thereafter sent the dead body for the Post Mortem. Police also recorded the statements of other persons. The accused Nos. 1 to 6 were arrested on 27th October 1995. Subsequently, other accused were also arrested. When the accused were in police custody they made a statement that they would produce the weapons concealed by them and accordingly police drew the necessary memorandums and panchanams and attached the weapons. The attached articles including the clothes of the deceased, Complainant as well as the accused were sent for the Chemical Analysis. After completion of the investigation, police submitted charge-sheet against in all 12 accused persons for the offences mentioned above, in the court of JMFC Court No.7.

3. Finding that the accused persons are charge-sheeted for the offences punishable under Sections 307 & 302 of the Indian Penal Code, which were exclusively triable by the Sessions Judge, the learned JMFC committed the case to the Sessions Court, Pune. The Additional Sessions Judge, Pune framed charge (Exhibit-16) against the accused for the offences mentioned above. All the accused pleaded not guilty to the said charge and claimed to

be tried. From the suggestions put to the Prosecution witnesses as well as the statement of the accused recorded under Section 313 of the Code of Criminal Procedure, it appears that the defence of the accused is of total denial.

4. In order to bring home the guilt of the accused, prosecution has examined in all 12 witnesses consisting of Pw.1- Dnyanshwar Genu Dighe, the panch witness and son-in-law of the deceased (Exhibit-35), Pw.2- Sopan Maruti Bodke, another panch witness, Pw.3- Sakharam Dharmaji Kudale, the Complainant Exhibit-45, Pw.4- Anna Dhaku Margale, another panch witness Exhibit-50, Pw-5 Kanta Dighe to whom disclosure was made by the Complainant and Maruti about the incident, Pw.6- Ramchandra Zore, eye-witness to the incident, Pw.7- Maruti Kudale another eye-witness, Pw.8- Bajirao Nathu Thengare, panch for the attachment of the clothes of the accused. Pw.9 PSI-Vijay Shinde who had initially started investigation. Pw.10- Dr. Prakashchand Ridashri who treated the Complainant Sakharam at the hospital and issued medical certificate Exhibit 64, Pw.11- Dr.Nandkishor Anant Deshmukh who did post mortem and Pw.12- Arun D. Walture who carried out further investigation in the matter. The prosecution

also produced the Inquest Panchnama Exhibit 29, Panchnama of the clothes of the accused Exhibit 30, Memorandams and other panchnamas vide Exhibit 36-A to 41-B. Panchnama of the place of the offence Exhibit 48. P.M. Notes Exhibit 72, C.A. Reports Exhibits 95 & 96 etc. The defence did not adduce any evidence.

5. After considering the entire evidence on record, the learned trial court came to the conclusion that the prosecution has proved beyond reasonable doubt that there was an unlawful assembly and the common object of the same was to assault Sakharam and Tukaram but at the relevant time, the accused Nos.1 & 3 assaulted Sakharam and tried to commit his murder. The learned trial Judge also held that the accused Nos. 4 to 6 in furtherance of their common intention assaulted Tukaram with deadly weapons and thereby committed his murder. The trial Court, therefore, passed the above mentioned order of conviction and sentence.

6. Original accused Nos. 1 & 3 to 6 have challenged the said order in these appeals. As both the appeals are arising out of one and the same judgment, the same are being disposed of by this

common judgment.

7. In these appeals before us, Smt. Revati Mohite-Dere, learned Advocate for the accused has urged three points; Firstly, she submitted that the learned trial court has not properly appreciated the evidence on record and has failed to notice the discrepancies in the ocular evidence. Secondly, she canvassed before us that the learned trial court has relied on recovery panchnama, though in fact, there was no substantive evidence with regard to the discovery. She further submitted that the learned trial Judge had acquitted the accused Nos. 1 & 7 to 10 holding that the prosecution evidence is not sufficient to prove charge against them but on the same evidence the trial Court convicted the present appellants. She, therefore, submitted that once the learned trial Judge acquitted some of the co-accused, on the same evidence, conviction of the present appellants is not sustainable. Lastly, she argued that even if it is held that at the relevant time, the accused Nos. 1 & 3 had assaulted the Complainant-Sakharam, still then there is nothing on record to indicate that they had an intention to commit murder so as to bring the case under section 307 of the Indian Penal Code. She further submitted

that there was no evidence with regard to an overt acts committed by the accused Nos. 4 to 6 and to show that the death of Tukaram was caused as a result of the overt acts committed by the accused Nos. 4 to 6 and as such they cannot be convicted even for the offence punishable under section 302 read with 34 of the Indian Penal Code. As against this, the learned APP supported the judgment and order passed by the learned trial Judge.

8. At the outset, it must be mentioned that it is an admitted fact that the Complainant, his brother and Maruti are residents of village Adgaon Ghutake-shiv and the accused persons are also residents of the same village. Admittedly, they were known to each other and there was some quarrel between the said two groups. If we carefully read the cross examination and the suggestions put to the prosecution witnesses, then it is very clear that the occurrence of the incident at the relevant time and place of offence are not at all disputed by the defence. It is, in fact, not argued before us that the death of Tukaram is not homicidal. If we take into consideration the ocular evidence together with the PM notes wherein in Column No.17 the external injuries on the person of Tukaram are described and

in column 18 internal injuries have been described, we have no hesitation to hold that the death of Tukaram is homicidal.

9. The main and the material question is whether the said death is caused at the hands of the accused. While considering this aspect, we have to bear in mind that it is the prosecution case that at the relevant time, the accused persons had formed an unlawful assembly, the common object of which was to commit murder of Tukaram. Naturally, it is necessary to find out as to what evidence is adduced by the prosecution to prove the alleged unlawful assembly.

10. In order to prove that the accused had formed an unlawful assembly and consequently the assault was made on Sakharam and Tukaram, the prosecution is mainly relying on the evidence of the eye-wintesses, namely, Pw.3 Sakharam (Exhibit 45) and Pw.6 Maruti Sakharam Kudale (Exhibit-60). It is not in dispute that on the day of the incident the Complainant Sakharam had sustained injuries and as a result of the same he was even admitted in the hospital. He has categorically stated that at the relevant time, i.e., at 6.00 p.m. when they were passing by the side of the house of Bapu Dighe, the

accused persons, who were hiding themselves in paddy crop, came out of the same and at that time the accused Nos. 1, 3 & 5 were holding sickle and axe and they assaulted him, while other accused persons, who were holding weapons like sickle and axe assaulted Tukaram. It is pertinent to note that Sakharam has clearly admitted that he is not in a position to state about the over acts committed by each of the accused as well as he would not be in a position to state as to on which portion of the body of Tukaram a particular blow was given by the particular accused. In fact in such type of case when several accused persons have simultaneously attacked two persons, it is highly difficult to have specific evidence regarding overt act committed by each of the assailants.

11. Pw-3 Sakharam has stated that the accused Nos. 1, 3 & 5 assaulted him. However, admittedly though Sakharam has stated accordingly, the accused Nos. 1 & 3 are only held guilty for the the offence punishable under section 307 read with 34 of the Indian Penal Code. In fact, the learned trial judge has convicted all the accused Nos. 1 to 6 for the offences punishable under Sections 147, 148 & 341 read with 149 of the Indian Penal Code which

indirectly means that the learned trial Judge has not held that the common object of the unlawful assembly was to commit murder or to make an attempt to commit murder of Sakharam. It must be noted, at this stage only, that admittedly the State has not preferred any appeal against the acquittal of the accused persons for the offence punishable under section 302 read with 149 of the Indian Penal Code. When such is the position, now it is in fact not open for this court in these appeals to consider as to whether the accused can be convicted for the offence punishable under section 302 read with section 149 of the Indian Penal Code. So, the only question is whether the findings recorded by the learned trial Judge to the effect that the accused Nos. 4 to 6 are guilty of the offence punishable under section 302 read with 34 is correct or not. While considering this aspect, firstly, it must be noted that PW- Sakharam (Exhibit-45) and PW-Maruti (Exhibit-60) have stated that at the relevant time the other accused persons, namely, the accused Nos. 2, 9, 10 & 8 had also assaulted Tukaram with deadly weapons. If such is the position, naturally the question will arise as to which of the blows were given by the accused Nos. 4, 5 & 6, which ultimately proved to be fatal. If we see P.M.Report Exhibit-72 we find that the deceased

Tukaram had sustained several injuries and out of which about 15 injuries were incised wounds and most of them were on hands and legs but at the same time there were also some incised wounds which may be stated to be on vital parts and as such fatal. The very fact that Tukaram has died on the spot is sufficient to hold that the injuries in question were sufficient in the ordinary course of nature to cause death. Merely because Pw. Sakharam has not stated anything specifically about the same, we cannot jump to the conclusion that the injuries in question were not sufficient in the ordinary course of nature to cause death. It is true that normally the court should not introduce its own opinion about the injuries if concerned Doctor has not stated about the same. However, at the same time we cannot ignore the fact that in the instant case, there were 34 injuries and the person has died on the spot. So under such circumstances, we have no hesitation to hold that at least some of the injuries which are incised wounds were sufficient in the ordinary course of nature to cause death. But as stated above, the prosecution has not adduced any evidence to show that the accused Nos. 4, 5 & 6 have caused particular injuries by particular weapons when such is the position and other co-accused have been acquitted, though the

prosecution witness had involved them and stated that they had assaulted Tukaram with the deadly weapons, the accused Nos. 4, 5 & 6 cannot be convicted for the offence punishable under Section 302 of the Indian Penal Code. At the most, it can be said that as the said accused persons were holding deadly weapons and it has been specifically stated by Sakharam (Pw.5) and Maruti vide Exhibit 60 that the accused Nos. 4, 5 & 6 have assaulted Tukaram with weapons which they were holding in their hands and Tukaram sustained grievous injuries, it can be said that they are guilty of the offence punishable under section 326 read with section 34 of the Indian Penal Code.

12. We cannot ignore the fact that in the instant case Sakharam is the injured eye-witness while Ramchandra Zore is an eye-witness to the incident. Curiously enough, the said witness has not involved the accused Nos. 7 to 12 in the instant case. On the contrary, he has specifically stated that at the relevant time, he had seen only the accused Nos.1 to 6 and they were holding sticks. Thus, there is in fact some discrepancy with regard to the weapons which the accused Nos. 1 to 6 were holding. Complainant - Sakharam (Exh.45) has stated

that some of the accused were having sickle and axe, while as per the testimony witness- Ramchandra Zore, the accused Nos.1 to 6 were holding sticks. It is tried to be argued that as there is discrepancy between the testimony of Sakharam and Ramchandra and other two witnesses, viz., Pw.5 & Pw.7, the evidence of Ramchandra Zore should be disbelieved. However, if we carefully read his evidence, we find that he is an independent witness. There is nothing on record to show that he had animus or grudge against the accused as a result of which he may try to implicate the accused persons falsely. The evidence of Ramchandra Zore definitely establishes that at the relevant time, the accused Nos.1 to 6 were present at the spot, not only that, but they started beating Tukaram and Sakharam with the weapons which were in there hands.

. Similarly, though it is tried to be suggested that witness Kanta Dighe (Pw-5) is not trustworthy witness, because there is discrepancy in her evidence and the evidence of the Complainant; and the Complainant has not stated either in the FIR Exhibit-47 or his substantive evidence that Kanta Dighe was accompaning them. In fact, Kanta Dighe is a witness to whom the Complainant has made disclosure

about the assailants. She has stated that the Complainant disclosed to her that at the relevant time, the accused Nos.1 to 4 & 6 bet him and Tukaram. So, merely because her name is not mentioned in the FIR, we cannot jump to the conclusion that she is a got up witness.

13. From the evidence on record, the prosecution has not established that the accused Nos. 1 & 3 have given particular blows to Tukaram and the injuries caused as a result of those blows were sufficient in the ordinary course of nature to cause death. It was, therefore, argued that the offence punishable under section 307 of the Indian Penal Code is not committed by these accused persons. Even as per the statement of the Complainant it is not the case of the prosecution that only the accused Nos.1 & 3 had given blows to him, but even according to him the accused Nos.1, 3 & 5 had assaulted him.

. If we see the medical certificate Exhibit-69 in respect of the Complainant Sakharam, we find that he has sustained following injuries:

> 1. Incised wound on Lt. frantal region oblique Ap.1.3/4" X 1/4" bone deep, no fracture edges whilst no active bleeding.

2. Incised wound on Lt.paritoccipital Region oblique one 3" x 1/4" bone deep, no fracture edges whiltst no active bleeding.

3. CLW on Lt. shin at junction of lower and middle 3rd 3/4" X 1/4" facia deep bleeding 1/2" X 1/4" muscle deep no active bleeding.

4. CLW on Rt shin Anteriority at junction of lower and middle 3rd 1" X 1/2", 1/2" X 1/4" facia deep bleeding.

5. Contusion on dorsum of Lt. hand 2.1/2" X 2" tenderness over 2nd and 3rd metacarpal part whilst fracture metacarpal.

. Most of these injuries are on leg and hand. But there is one injury which is on the head. But, as it is the prosecution is not able to prove beyond reasonable doubt that the said injury was caused at the hands of the accused Nos. 1 and 3 or the accused Nos. 1 or 3. So, under such circumstances, it cannot be said that the accused Nos. 1 & 3 in furtherance of their common intention tried to commit murder of Sakharam and they are guilty of the offence punishable under Section 307 of the Indian Penal Code. Having regard to the fact that the witness Ramchandra Zore has stated that when he saw the accused Nos. 1 to 6 coming out of the field they were holding sticks, we are of the view that the accused Nos. 1 & 3, at the most, can be

convicted for the offence punishable under Section 325 of the Indian Penal Code, because admittedly the Complainant Sakharam had sustained fracture and as such there was a grievous injury to him.

14. From the evidence on record it is very clear that the prosecution has established that at the relevant time there was an unlawful assembly and the accused Nos.1 to 6 were the members of the said assembly and they had deadly weapons with them. So the conviction for the offences punishable under Sections 147 & 148, 149 & 323 read with 149 and for the offence punishable under section 341 read with 149 of the Indian Penal Code against the accused Nos. 1 to 6 shall have to be maintained. While, the conviction of the accused Nos. 1 to 3 for the offence punishable under Section 307 read with 34 of the Indian Penal Code has to be reduced to the offence punishable under section 325 read with 34 of the Indian Penal Code.

. This takes us to the question of sentence. While considering this aspect it has to be mentioned that the Complainant-Sakharam has filed affidavit wherein he has categorically stated that the accused Nos. 1 & 3 are on bail and he is not having any

grievance against them, and he has compounded the offence with the accused Nos. 1 & 3. It is needless to say that the offence punishable under section 307 of the Indian Penal Code as well as for the offence punishable under sections 147 & 148 are not compoundable. It is well settled that once the offence is not compoundable and the same is not shown in Section 320 of the Code of Criminal Procedure same cannot be compounded. However, in the instant case, having regard to all the facts and circumstances of the case, and in particular the affidavit filed by the Complainant, we feel that the ends of justice will be served if the accused Nos.1 & 3 to 6 are convicted for the offences punishable under Sections 147, 148, 341 read with 149 and section 323 read with 149 of the Indian Penal Code and are sentenced to undergo imprisonment which is already undergone by them and the accused Nos. 1 & 3 are convicted for the offence punishable under section 325 read with 34 of the Indian Penal Code and sentenced to suffer imprisonment already undergone by them.

15. In the result, both appeals are partly allowed.

16. The order of conviction passed against the

accused Nos. 1 & 3 to 6 for the offence punishable under sections 147, 148, 323 read with 149 and 341 read with Section 149 is maintained. However, the order of substantive sentence in respect of the above offences is only modified and they are sentenced to undergo imprisonment for the period of detention already undergone by them.

17. The order of conviction and sentence passed against the accused Nos. 1 and 3 for the offence punishable under section 307 read with section 34 of IPC is set aside instead the accused Nos. 1 and 3 are convicted for the offence punishable under section 325 read with Section 34 of the IPC and sentenced to suffer imprisonment already undergone by them and to pay fine of Rs.5,000/- each i/d to suffer R.I. for one year.

18. The order of conviction and sentence of accused Nos. 4, 5 & 6 for the offence punishable under section 302 read with 34 of the IPC is set aside and instead the accused Nos.4, 5 & 6 are convicted for the offence punishable under section 326 read with 34 of the IPC and sentenced to suffer imprisonment already undergone by them and to pay fine of Rs.5,000/- each i/d to suffer one year R.I.

19. Rest of the order passed by the trial Judge is maintained.

20. The bail bonds of the accused Nos. 1 and 3 stand cancelled.

21. Accused Nos. 4, 5 & 6 be released forthwith if they are not required in any other case.

(S.R.SATHE,J.) **(S.B.MHASE, J.)**

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